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No. 93-897

In The

Supreme Court of the United States

October Term, 1993

CONCORDIA COLLEGE CORPORATION,

Petitioner,

v.

W.R. GRACE & CO., W.R. GRACE & CO.-CONN.; UNITED STATES GYPSUM COMPANY; KEENE CORPORATION; PFIZER, INC.; AND BASIC, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner ("Concordia College") offers this Reply to the Brief in Opposition ("Opposition") to emphasize what is undisputed, the crucial distinctions the Respondents fail to draw, and their resurrection of an argument they belatedly raised in the District Court and abandoned on appeal.

I. THE EIGHTH CIRCUIT'S DECISION ABOUT MINNESOTA LAW DOES NOT MERELY RAISE AN ISSUE OF STATE LAW BECAUSE IT AND A DECISION FROM THIS COURT DIRECTLY CONFLICT.

Respondents fail to recognize that the Eighth Circuit's decision that the Minnesota Revival Statute creates "substantive rights" [A. 12] does not merely raise an issue of state law. It directly conflicts with *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). *Chase Securities* involved a Minnesota statute which, like the one at issue here, revived actions previously time-barred by another state statute if the revived action was brought by a specific date (one year from the revival statute's enactment). *Id.* at 308. While the Respondents correctly note that this Court declined to settle the split among the state courts on whether such statutes are procedural bars which effect only the remedy or whether they create substantive rights [Opposition at 11 n. 7], they ignore that this Court upheld the Minnesota Supreme Court's decision to follow this Court's earlier holding that such revival statutes do not violate due process because they do not create substantive rights. *Id.* at 309, *citing Campbell v. Holt*, 115 U.S. 620 (1885).

Respondents do not suggest that *Donaldson* was incorrectly decided or that the Minnesota Supreme Court's view has changed. This view – a revival statute which contains a specific deadline does not create substantive rights – directly conflicts with the decision below [A. 12]. This conflict warrants review.

II. IF THE REVIVAL STATUTE IS TOLLED, THE STATUTE REVIVES CONCORDIA'S PREVIOUSLY TIME-BARRED CLAIMS.

To side-step the *Donaldson* decision's holding that these revival statutes are not substantive (and are thus subject to tolling), Respondents say that tolling does not apply because the separate Repose Statute barred Concordia's claims before the class action was commenced [Opposition at 9-10]. The Petition did not ask this Court to decide whether the Repose Statute was tolled by the class action. It asked this Court to decide whether the *Central Wesleyan* filing tolled the Revival Statute's July 1, 1990 deadline [Petition at 5-7 (Questions 1-2)].[1] If it does, it is undisputed that the Revival Statute revives Concordia's claims which were previously barred by the ten-year Repose Statute. *Independent School District No. 197 v. W.R. Grace & Co.*, 752 F.Supp. 286, 296-298 (D.Minn. 1990).

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[1] Respondents imply that this issue is not preserved because Concordia did not raise it until after the hearing on the summary judgment motion [Opposition at 3 n. 2]. Concordia did raise Revival Statute tolling at the motion hearing [A. 21-22], and it was the issue decided by the District Court [A. 16] and the Eighth Circuit [A. 10-12]. The issue is preserved.

III. IF THE REVIVAL STATUTE IS NOT TOLLED AND THE CLASSES ARE EVER DECERTIFIED, NO MINNESOTA SCHOOL, COLLEGE OR UNIVERSITY CAN EVER BRING A TIMELY ACTION.

Respondents' emphasis on the Repose Statute's effect absent the Revival Statute's protection illustrates perfectly why certiorari should be granted. Absent the Revival Statute's tolling, it is undisputed that none of the multitude of Minnesota members in *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993) or in *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 & 915 (1986) can ever bring an individual action which survives the Repose bar [Petition 6-7].

While the Eighth Circuit held that the Revival Statute protects those in the class, its discrimination against individual actions ignores that individual actions may be forced on the present Minnesota class members involuntarily. *Central Wesleyan* and *In Re School Asbestos Litigation* were only conditionally certified, and both Circuits emphasized that the classes could and should be decertified if the District Courts later determine they are unmanageable. *Central Wesleyan*, 6 F.3d at 189-190; *In re School Asbestos Litigation*, 789 F.2d at 1011. If decertified, it is undisputed that the decision below deprives each and every Minnesota school, college, and university of the Revival Statute's protection against the Repose bar [Petition at 6-7]. The Revival Statute – a statute specifically designed to avoid the Repose bar – would be meaningless for them.

It is also undisputed that the Minnesota class members are not the only ones at stake. Class members from other states which have similar revival statutes now have every incentive to file separate actions within the deadlines set in their states' revival statutes [Petition at 7]. The clash between this needless multiplicity of actions and Rule 23 of the Federal Rules of Civil Procedure is precisely what the tolling rule was designed to avoid. *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 350-351 (1983).

IV. THIS COURT SHOULD GRANT CERTIORARI TO BALANCE THE INTEREST IN MAINTAINING FEDERAL CLASS ACTIONS AGAINST STATE LAW DISTINCTIONS BETWEEN "SUBSTANTIVE" AND "PROCEDURAL" DEADLINES.

It is undisputed that the Eighth Circuit failed to consider the federal interest in ensuring the efficiency and economy of diversity-based class actions or that a different panel of the Eighth Circuit more recently held that these interests "are sufficiently strong to justify tolling in a diversity case when the state law provides no relief." *Adams Public School District v. Asbestos Corp., LTD.,* 7 F.3d 717, 718-719 (8th Cir. 1993).

To argue otherwise, the Respondents offer the same arguments *Adams Public School District* rejected [Opposition at 11-13] and remarkably add that no federal interests exist because Concordia filed an independent action "in lieu of remaining in a pending class action" [*Id.* at 13]. The Respondents expressly abandoned this argument on

appeal,[2] and it is the very *per se* argument against tolling that caught Concordia by surprise in the District Court [A. 22-23]. Had the argument been raised timely, the record shows that Concordia would have presented its fraud evidence before judgment was rendered [A. 22].

In any event, the Respondents' argument [Opposition at 13] raises a subsidiary issue "fairly included" within Question 2 of the Petition. In balancing the federal interests identified in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) against the state statute, are the federal interests just as strong when the separate action is filed before class certification is denied? While the District of Columbia and First Circuits apparently think not [Opposition at 13], *Adams Public School District* held that tolling applies even after a class is certified, *Adams Public School District*, 7 F.3d at 718 n. 1, and the Court below noted that this Court "intimated" as much in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n. 13 (1974) [A. 10]. This is the majority view.[3]

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[2] "The federal class action tolling rule provides that, *after opting out of a class action*, a plaintiff must file its individual action, or be barred by a statute of limitations, within the time remaining when the class action was commenced. For the limited purpose of this appeal, Appellees do not dispute this principle" [Appellees' Joint Brief at 12 (emphasis added)].

[3] Asbestos property damage decisions also include *May v. AC&S, Inc.*, 812 F.Supp. 934, 938-939 (E.D.Mo. 1993); *Independent School District No. 197 v. W.R. Grace & Co.*, 752 F.Supp. 286, 291 (D.Minn. 1990); *West Haven School District v. Owens-Corning Fiberglas Corp.*, 721 F.Supp. 1547, 1555 (D.Conn. 1988). Courts reaching the same conclusion in different contexts include *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488-89 (9th Cir. 1985); *Rochford v. Joyce*, 755 F.Supp. 1423, 1428 (N.D. Ill. 1990); *Sinclair*

Certiorari is necessary to review whether *Adams Public School District* correctly decided that the federal interests in maintaining diversity-based class actions justify tolling even though state law provides no relief. To resolve this issue, the Court may need to further resolve the Circuit split on whether tolling applies when the separate action is filed before class certification is denied.

V. THE DISTRICT COURT DECLINED TO REVIEW CONCORDIA'S FRAUD EVIDENCE BECAUSE IT BELIEVED IT LACKED THE DISCRETION TO DO SO.

The Respondents' Rule 59(e) arguments about the abuse of discretion standard fail to draw the crucial distinction between a District Court's exercise of discretion and the District Court's belief that it has no discretion to exercise. *See Cardinal Chemical v. Morton International, Inc.*, 508 U.S. ___, 124 L.Ed.2d 1, 18-19 (1993) (Scalia, J. concurring) (drawing same distinction).

The District Court did not exercise any discretion when it declined to review Concordia's fraud evidence. It instead held that the law prevented the Court from looking at the evidence: "if the proffered evidence was available before the disposition of the motion for summary judgment, then as a matter of law, the movant is not entitled to reconsideration based upon that evidence" [A. 18]. The appellate decision is just as clear – the Eighth

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Oil Corp. v. Atlantic Richfield, 720 F.Supp. 894, 912 and n. 48 (D.Utah 1989); *Bantolina v. Aloha Motors, Inc.*, 419 F.Supp. 1116, 1121-22 and n. 19 (D.Haw. 1976); *Agostine v. Sidon Corp.*, 69 F.R.D. 437, 448 n. 13 (C.D. Pa. 1976).

Circuit flatly held that a Rule 59(e) motion may not be used "to introduce new evidence that could have been adduced during pendency of the summary judgment motion . . . " [A. 7].

The Fifth and First Circuits, and an earlier decision from the Eighth Circuit, disagree and hold that District Courts do have the power to consider evidence first presented on a motion to alter or amend that could have been presented before judgment was rendered [Petition at 9].

The Respondents lastly suggest that this Circuit split need not be resolved because Concordia failed to present a "compelling" reason why it did not present its fraud evidence before judgment was rendered [Opposition at 17]. They do not, however, dispute that Concordia twice raised the fraud issue before judgment was rendered and specifically requested an opportunity to present the evidence before judgment was rendered [Petition at 3]. They further do not dispute that the District Court denied Concordia's request because the Court mistakenly believed another issue was clearly before the Court when it was not [Petition at 3 n. 1]. If this Court decides that District Courts have the power under Rule 59(e) to vacate summary judgments based on evidence not newly discovered, the determination of whether these circumstances justify doing so is for the District Court on remand.

Certiorari is warranted to resolve the Circuit split on the District Court's power under a motion to alter or amend.

Respectfully submitted,

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